BRB No. 01-0408 BLA

MILFORD C. TACKETT Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Milford C. Tackett, New Lexington, Ohio, *pro se*.

Laura Metcoff Klaus and Tab Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-1111) of Administrative Law Judge Robert L. Hillyard denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act).[1] Claimant filed a duplicate claim on August 7,

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February

1997.[2] The administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, considered claimant's 1997 claim on the merits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his belief that the instant case is not affected by any of the revisions to the regulations.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial

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9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on May 16, 1973. Director's Exhibit 30. The SSA denied the claim on August 29, 1973. *Id.* The Department of Labor denied the claim on October 28, 1981. *Id.* There is no evidence that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on August 7, 1997. Director's Exhibit 1.

evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 12-13. All of the x-ray interpretations submitted since the final denial of claimant's 1973 claim are negative for pneumoconiosis. These negative x-ray interpretations include twenty-one interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists.[3] Director's Exhibits 11, 24, 25, 27-29; Employer's Exhibits 3, 5, 7, 9,

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[3]Drs. Gogineni, Baek, Binns, Abramowitz, Soble, Duncan, Laucks, Spitz, Shipley, Sargent and Wiot, each qualified as a B reader and Board-certified radiologist, interpreted claimant's August 28, 1997 x-ray as negative for pneumoconiosis. Director's Exhibits 11, 24, 25, 27-29; Employer's Exhibit 23. Drs. Renn, Castle, and Fino, each qualified as a B reader, also interpreted claimant's August 28, 1997 x-ray as negative for pneumoconiosis. Employer's Exhibits 16, 20, 21. (The administrative law judge apparently counted Dr.

16, 20, 21, 23.

Wiot's negative interpretation of claimant's August 28, 1997 x-ray twice. *See* Decision and Order at 6; Director's Exhibit 24; Employer's Exhibit 23.)

Drs. Spitz, Shipley, Wiot and Wheeler, each qualified as a B reader and Board-certified radiologist, interpreted claimant's January 14, 1998 x-ray as negative for pneumoconiosis. Employer's Exhibits 3, 5, 7, 9. Drs. Renn, Castle, and Fino, each qualified as a B reader, also interpreted claimant's January 14, 1998 x-ray as negative for pneumoconiosis. Employer's Exhibits 16, 20, 21.

The administrative law judge accorded greater weight to the more recent evidence because he found that it was "more probative of...[c]laimant's current physical condition." Decision and Order at 12. Consequently, the administrative law judge did not directly address the x-ray evidence submitted in connection with claimant's 1973 claim. This evidence includes a positive interpretation of a September 16, 1980 x-ray rendered by Dr. Gordonson, a B reader and Board-certified radiologist.[4] *See* Director's Exhibit 30. The administrative law judge erred to the extent that he discredited Dr. Gordonson's positive x-ray interpretation solely because later x-rays were interpreted as negative. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). However, given the fact that two subsequent x-rays taken on August 28, 1997 and January 14, 1998 were uniformly interpreted as negative by equally qualified physicians, the administrative law judge's failure to address Dr. Gordonson's x-ray interpretation constitutes harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).
Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy evidence, the administrative law judge properly found that claimant was precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). Decision and Order at 13; 20 C.F.R. §718.202(a)(2). Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under

[4] Dr. Gordonson's positive interpretation of claimant's September 16, 1980 x-ray is the only positive x-ray interpretation in the record. Dr. Jones, a physician whose radiological qualifications are not found in the record, interpreted claimant's September 16, 1980 x-ray as "normal." Director's Exhibit 30.

20 C.F.R. §718.202(a)(3) (2000).[5] *Id.* Consequently, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

The administrative law judge next considered whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. While Dr. Knight opined that claimant suffered from a respiratory impairment attributed to in part by his coal dust exposure, Director's Exhibit 10, Drs. Fino, Renn, Castle, Tuteur and Mutchler opined that claimant did not suffer from pneumoconiosis. The administrative law judge acted within his discretion in discrediting Dr. Knight's opinion because the doctor did not adequately explain how he was able to make a nexus between claimant's lung disease and his coal dust exposure. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13; Director's Exhibit 10. The administrative law judge also properly accorded greater weight to the opinions of Drs. Fino, Renn, Castle and Tuteur that claimant did not suffer from pneumoconiosis because he found that their opinions were "well reasoned, well explained, and well supported." Decision and Order at 13; Employer's Exhibits 13, 15, 16, 21, 25, 26. The administrative law judge further found that Dr. Mutchler's opinion that claimant did not suffer from pneumoconiosis was well supported and entitled to substantial weight. Decision and Order at 13; Employer's Exhibits 1, 24. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[5]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

§718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge